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IN THE  
**Supreme Court of the United States**  
October Term, 1987

UNITED STATES OF AMERICA,  
*Respondent,*

vs.

NORTHERN IMPROVEMENT COMPANY;  
STEVE McCORMICK;  
AND F-M ASPHALT, INC.;  
*Petitioners.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT**

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44 pp



### **ISSUE PRESENTED**

Whether the receipt of payment from the bidding authority for work performed by a contractor can continue the limitations period when the only substantial term alleged in the Sherman Act indictment is an agreement to submit collusive, noncompetitive, and rigged bids, and all such bids were submitted more than five years prior to indictment.



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#### OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is reported at 632 F.Supp. 1576 (D.N.D. 1986). (Appendix at 18.) The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 814 F.2d 540 (8th Cir. 1987). (Appendix at 30.)

#### JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit, reversing the dismissal of the indictment by the United States District Court for the District of North Dakota and remanding the case for trial, was entered on March 24, 1987. The order of the United States Court of Appeals for the Eighth Circuit denying petitions for rehearing was entered on May 8, 1987. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS

The statutory provisions involved in this case are section 1 of the Sherman Act, 15 U.S.C. §1, and the five-year statute of limitations for noncapital offenses, 18 U.S.C. §3282.

Section one of the Sherman Act provides:

1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §1.

Section 3282 of Title 18, United States Code, provides:

§3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. §3282.



## STATEMENT OF THE CASE

The basis for federal district court jurisdiction in the first instance is 18 U.S.C. § 3231.

On October 9, 1985, a federal grand jury in North Dakota indicted Northern Improvement Company; William Collins, Inc.; F-M Asphalt, Inc.; S & S Construction Co.; and Steve McCormick, on one count of violating section 1 of the Sherman Act, 15 U.S.C. § 1. Northern Improvement Company, F-M Asphalt, and Steve McCormick moved to dismiss the indictment on the basis that the five-year statute of limitations in 18 U.S.C. § 3282 barred the prosecution. On April 25, 1986, the United States District Court for the District of North Dakota, Chief Judge Patrick A. Conmy, dismissed the indictment. The Government appealed the dismissal to the United States Court of Appeals for the Eighth Circuit, which reversed the district court's dismissal of the indictment and remanded the case for trial.

The indictment alleges the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce, in violation of 15 U.S.C. § 1. The only "substantial term" of the conspiracy alleged in the indictment was to submit collusive, noncompetitive, and rigged bids to the City of Fargo, North Dakota; the City of West Fargo, North Dakota; and the City of Moorhead, Minnesota, for the award of municipal street improvement projects in those cities. The Government conceded the last improvement project that was rigged pursuant to the alleged conspiracy was let on June 16, 1980, more than five years before the return of the indictment.

The Government attempted to bring the prosecution within the five-year limitation period through

its drafting of paragraph 19 of the indictment. Paragraph 19 alleges that the conspirators combined and conspired "with the expectation that the low bidder would be awarded the project and paid by the city" and that the conspirators conspired to "receiv(e) and accept( )" payments for work performed on the allegedly rigged street improvement projects. The Government contends merely because a final payment for completed contract work was made by a nonconspirator-municipality on July 28, 1981, the alleged conspiracy continued for statute of limitations purposes until the date of that payment.

The Government filed a voluntary bill of particulars, in response to Defendants' motions, that summarized the evidence the Government intended to present at trial to prove the existence and duration of the alleged conspiracy. The bill of particulars provided that the conspirators agreed which company would be the low bidder on municipal street improvement projects, and the designated low bidder then provided bid amount numbers for the other coconspirators to use in preparing their bids so those bids would be intentionally high and noncompetitive. The bill of particulars further provided the coconspirators carried out the conspiracy by submitting the collusive bids to the municipal letting agencies and receiving payments from the municipalities. The bill of particulars gave no indication, however, as to how the receipt of such payments constituted an act in furtherance of the objective of the alleged conspiracy.

The bill of particulars provided that numerous municipal street improvement projects were rigged as part of the conspiracy. The last municipal street improvement project on which the Government alleged the bids were rigged was let on June 16, 1980.

In an effort to bring the Sherman Act conspiracy within the five-year statute of limitations period, the Government alleged the conspiracy continued until at least July 28, 1981, when final payment by check was made by the City of Fargo to Northern Improvement Company for work on a project let by the City of Fargo on March 3, 1980. The bill of particulars listed several payments that were made by the municipalities and received by Northern Improvement Company; F-M Asphalt, Inc.; William Collins, Inc.; and S & S Construction Co. within the five-year statute of limitations period, or after October 9, 1980. The bill of particulars, however, did not allege any acts specifically done by Steve McCormick within the five-year statute of limitations period.

The defendants moved to dismiss the indictment on the ground that the five-year statute of limitations in 18 U.S.C. § 3282 barred the prosecution, because the alleged conspiracy ended in June 1980 when the bids on the last allegedly rigged contract were submitted and the last contract was awarded. The receipt of payments from the municipalities by the defendants for the completed work was not done in furtherance of the objective of the alleged conspiracy to submit collusive, noncompetitive, and rigged bids in restraint of trade and did not require continued agreed-upon cooperation between the defendants.

The district court dismissed the indictment and held the conspiracy terminated when the last allegedly rigged bids were submitted, because no other action in furtherance of the conspiracy was necessary or taken after that time. Judge Conmy explained his decision to dismiss the indictment as follows:

No claim is made that the parties engaged in any joint action after submitting the rigged bids. The indictment and the bill of particulars alleged an agreement resulting in each defendant being the "designated bidder" on a separate project. The consideration between the "criminal partners" was the abstention of the others from bidding competitively upon each other's "designated project." The terms and conditions of the illegal contract were completed when the rigged bids were submitted. No sharing of the spoils after payment or showing of favoritism on subcontract award is present.

Under the indictment and bill of particulars, the Court is forced to the conclusion that the purpose of the conspiracy was accomplished when the rigged bids were submitted. No guarantees existed that any or all of the rigged bids would be a successful bid. Each contractor, if successful as the bidder, had the opportunity to profit or lose money on a specific project. If unsuccessful as a bidder, no consolation payment or subcontract opportunity is present. No conspirator had any participation rights or obligation to the others after the bid was submitted.

Each individual conspirator who was awarded a bid received payment upon completion of that project. Common sense tells us that the hope of the opportunity to profit was a common motivating factor behind the formation of the conspiracy. It does not follow, however, that the purposes of the "criminal partnership" survived the bid submissions. Once the bids were submitted, only the interest of each individual bidder, as an in-

dividual and not as a coconspirator, remained. No partnership interest or conspiracy purpose remained. Therefore, this situation is distinguishable from the situation in A-A-A and INRYCO where there were "payoffs" made to coconspirators after the bids were submitted.

*United States v. Northern Improvement Co.*, 632 F. Supp. 1576, 1581 (D.N.D. 1986).

On appeal, the eighth circuit held the objective and purpose of the alleged Sherman Act conspiracy was illicit gain or the receipt of payment, rather than the restraint of trade. Thus, the eighth circuit held the Sherman Act conspiracy did not terminate when the bids were submitted and trade was restrained.

The eighth circuit ignored United States Supreme Court precedent holding that continuous agreed-upon cooperation among defendants is required to continue a conspiracy for statute of limitations purposes and that mere continuance of the result of a crime does not continue the crime. The eighth circuit also ignored the plain language of the Sherman Act and the purpose of the statute of limitations.

The eighth circuit did not point to any cooperation among the defendants after the bids were submitted. Since the court decided the objective of the Sherman Act conspiracy was illicit gain, rather than restraint of trade, and receipt of payment was in furtherance of that objective, it ignored the continuous cooperation requirement and held the conspiracy continued until the individual defendants received payments. The eighth circuit's holding that, in effect, mere results of a crime, including receipt of payments on rigged contracts, continue the crime for statute of limitations purposes could

obliterate the statute of limitations and allow prosecution for several more than five years after the conduct to which the Sherman Act is directed, restraint of trade.

## REASONS FOR GRANTING THE WRIT

A. *The decision below is in conflict with applicable decisions of the United States Supreme Court.*

In reaching its decision the eighth circuit ignored contrary precedent of this Court. This Court has held a crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement; that is, the scope of the conspiratorial agreement determines the duration of the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 397 (1957).

In *United States v. Kissel*, 218 U.S. 601, 608 (1910), this Court explained that a criminal conspiracy is a kind of partnership in criminal purposes, an understanding or agreement between two or more persons to do something unlawful. The gist of the offense is the confederation and agreement to *act together* and *cooperate* in a criminal partnership.

This court in *Kissel* explained the duration of a criminal conspiracy as follows:

It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It is also true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U.S. 450, 25 L. Ed. 193, 3 Am. Crim. Rept. 334. But when the plot contemplates bringing to pass a continuous result



that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will *continue their combined efforts* to drive the competitor out until they succeed. *If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of the abandonment or success.*

*Kissel*, 218 U.S. at 607-08 (emphasis added). Thus, a criminal conspiracy only continues while the conspiratorial agreement contemplates the continuous cooperation and combined efforts of the conspirators to keep it up and the conspirators do continue such combined efforts.

Although the Court in *Kissel* was not required to address the issue of when the conspiracy had "succeeded," the Court focused exclusively on the accomplishment of the anticompetitive trade restraint and did not address the effects of the trade restraint. Nor did the Court address the impact, for purposes of analyzing the statute of limitations, of objectives ancillary to the objective of actually restraining trade. There is no support in *Kissel* for the proposition that objectives ancillary to the objective of actually restraining trade, such as the receipt of the rewards from the anticompetitive conduct, continue the antitrust conspiracy until those objectives have been achieved.

*Kissel* supports Defendants' position that an antitrust conspiracy "succeeds" once the antitrust objective has been achieved and the conspirators are no longer restraining trade. Thus, the statute of limitations begins to run once trade is no longer restrained. The residual effects of an unlawful restraint, such as the receipt of payments without the necessity for further cooperative action by the conspirators, are irrelevant in determining when the statute of limitations begins to run.

The Government took the position, and the eighth circuit agreed, that an antitrust conspiracy has, as its ultimate objective, the illegal enrichment of the coconspirators. That is the objective of a conspiracy to defraud under the general conspiracy statute, but a conspiracy to defraud was not charged here. A plain reading of the Sherman act and the general conspiracy statute demonstrates the flaw in the Government's argument. The Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination...or conspiracy, in restraint of trade or commerce," while the general conspiracy statute, 18 U.S.C. § 371, prohibits a conspiracy "to defraud the United States, or any agency thereof." The Government should not be allowed to broaden its enforcement powers under the Sherman Act by persuading the federal courts to ignore the plain language of the Sherman Act.

The principle enunciated in *Kissel* of requiring continued and agreed-upon cooperation of the conspirators to extend the duration of the conspiracy for statute of limitations purposes was reiterated in *Fiswick v. United States*, 329 U.S. 211 (1946). In *Fiswick* the Court stated:

Though the result of the conspiracy may be continuing, the conspiracy does not thereby



become a continuing one. See *United States v. Irvine* (US) *supra*. *Continuity of action to produce the unlawful result*, or as stated in *United States v. Kissel*, *supra* (218 U.S. p. 607, 54 L. ed 1178, 31 S Ct 124), “*continuous cooperation of the conspirators to keep it up*” is necessary. A conspiracy is a partnership in crime....

*Fiswick*, 329 U.S. at 216 (emphasis added).

Once the conspirators achieve the objective of their conspiracy, acts that follow naturally are simply the results of the conspiracy, rather than acts in furtherance of the objective of the conspiracy. As stated above by this Court, the mere continuance of the result of a crime does not continue the crime. *Kissel*, 218 U.S. at 607-08; *United States v. Irvine*, 98 U.S. 450 (1879). Only an agreement for continuous cooperation and actual continuous cooperation pursuant to that agreement and in actual furtherance of the objective of the conspiracy will continue the conspiracy for statute of limitations purposes. *Fiswick*, 329 U.S. at 216; *Kissel*, 218 U.S. at 607-08.

The eighth circuit panel in this case, relying on *McDonald v. United States*, 89 F.2d 128, 133 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937), held that when a conspiracy contemplates illicit gain, the conspiracy always continues until that gain is realized. The rule enunciated in the *McDonald* case was more limited, however. The eighth circuit in *McDonald* provided the following guidance as to when a continuing conspiracy ends:

But if a court should be so hardy as to attempt to formulate a general rule as to when a continuing criminal conspiracy, having for its object illicit gain, is at an end, it

might well run somewhat thus: Whenever the unlawful object of the conspiracy has reached the state of consummation, whereat *the several conspirators having taken in spendable form their several agreed parts of the spoils, may go their several ways, without the necessity of further acts of consultation, about the conspiracy, with each other or among themselves, the conspiracy has ended.*

89 F.2d at 133-34 (emphasis added). Thus, the eighth circuit in *McDonald* indicated that mere realization of gain does not continue a conspiracy contemplating illicit gain. Rather, there must be an agreed-upon division of the spoils among the co-conspirators, requiring continued cooperation among the coconspirators. The eighth circuit in *McDonald* further indicated that a conspiracy ends when the necessity of further acts *with the coconspirators* or consultation *among the coconspirators* concerning the conspiracy no longer exists. *Id.*

The only way to avoid conflict with precedent of this Court is to hold the alleged conspiracy ended when the conspirators were no longer actively restraining trade and continuous cooperation of the conspirators was no longer contemplated, necessary, or occurring in pursuance of the conspiracy. When the allegedly rigged bids were submitted and the last contract was awarded, the object of the Sherman Act conspiracy, to restrain trade, was accomplished. The contractors no longer engaged in agreed-upon concerted or cooperative action in furtherance of their objective to restrain competition. The conspirators' obligations pursuant to their agreement with each other were complete when the bids were submitted. Competition was restrained, if at all, when the bids were submitted and, at the latest, when the last contract was awarded in June

1980, because the obligations of the contracting parties were set at that time. Competition was not again restrained, over a year later, at the time the municipality made its last payment on an allegedly rigged contract. The municipality's last payment on an allegedly rigged contract was merely the result of the alleged conspiracy to restrain competition, and this Court has held mere continuance of the result of a crime does not continue that crime for statute of limitations purposes. *Irvine*, 98 U.S. 450; *Kissel*, 218 U.S. at 607-08; *Fiswick*, 329 U.S. at 216.

*B. The decision below is in conflict with decisions from the ninth and fourth circuits on the same matter.*

In addition to the panel's decision being in conflict with United States Supreme Court precedent, the decision is in conflict with cases from the ninth and fourth circuits on the same matter. *See, United States v. A-A-A Electrical Company*, 788 F.2d 242 (4th Cir. 1986); *United States v. INRYCO, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982).

The *INRYCO* case strongly suggests that an antitrust conspiracy succeeds, and the statute of limitations begins to run, once trade is no longer restrained. The reason the antitrust conspiracy in *INRYCO* continued beyond the submission of bids was because the conspirators "continue(d) to commit acts in furtherance of the agreement which tend(ed) to suppress or restrain competition." 642 F.2d at 294. *INRYCO* provides no support for the proposition that acts that do not tend to restrain competition extend a Sherman Act conspiracy. The court's focus in *INRYCO* concentrated on the acts that restrained free competition, and it was only

those acts that were said to be within the scope of the antitrust conspiracy.

The fourth circuit in the A-A-A case recognized that when payments on rigged contracts were used for pay-offs to coconspirators, continuing cooperation among the conspirators was required until the pay-offs were made, and thus, the conspiracy continued until the pay-offs were completed. 788 F.2d at 245-46. No pay-offs or other continuing cooperation between the coconspirators was alleged in the present case after the time the bids were submitted, and thus, payment by the municipality not requiring cooperation among the defendants was not an act in furtherance of the objective of the conspiracy, to restrain competition as to the award of municipal improvement contracts.

*C. The petition presents a substantial federal question.*

The eighth circuit's decision of allowing payment by a nonconspirator-municipality to continue the conspiracy for statute of limitations purposes establishes a rule that is contrary to the purpose of the statute of limitations. It permits prosecution for several more than five years after the alleged non-competitive conduct.

The purpose of the statute of limitations is set forth in *Toussie v. United States*, 397 U.S. 112 (1970), as follows:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to *protect individuals from having to defend themselves against charges when the basic facts may have be-*

*come obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.* For these reasons and others, we have stated before “the principle that *criminal limitations statutes are ‘to be liberally interpreted in favor of repose,’* United States v. Scharton, 285 U.S. 518, 522; 76 L. Ed. 917, 919; 52 S. Ct. 416 (1932).”

397 U.S. at 114-15 (emphasis added).

In *United States v. Marion*, 404 U.S. 307, 322-23 (1971), the Supreme Court stated the underlying rationale of the statute of limitations is to “encourage promptness in the bringing of actions that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory.” 404 U.S. at 323 n. 14. The statute of limitations was said to represent the legislative judgment that “even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Id.*

Criminal statutes of limitation service society’s interest in the efficient administration of criminal law and in adjudication of guilt, which is more likely to be just if based on relatively fresh and, therefore, reliable evidence. The accused’s burden to defend himself becomes heavier with the passage of time, as witnesses die or cannot be traced and evidence needed for a defense is lost or destroyed. When these same problems face a government prosecutor, the prosecutor may elect not to proceed. A



defendant, however, has no such choice and may be put at an unfair disadvantage in rebutting the prosecution's proof.

The statutes encourage law enforcement agencies to concentrate on recent crimes, which offer a greater threat to society than those committed in the distant past. If a person committed a crime for which he can no longer be prosecuted, either he presents no further threat to society because he has committed no further crimes or the threat he represents will be met by prosecution for his recent crimes.

In the present case any threat to society or competition in trade that may have been present disappeared when the last allegedly rigged bids were submitted in June 1980. The Government has not alleged the defendants engaged in any further agreement or cooperative action to restrain trade. The passage of time presumably will interfere with the defendants' ability to present their best defense. For example, as indicated in the Government's bill of particulars, some of the alleged conspirators are deceased or are no longer in business. Any retaliatory interest of the Government should certainly be outweighed by the concern, which is central to our system of government, that the defendants' abilities to defend themselves presumably have been diminished by the passage of over five years from the allegedly illegal conduct. The statute of limitations is to be liberally construed in favor of repose, rather than to be set aside with the attitude that alleged wrongdoing should be prosecuted regardless of when it occurred. *See Toussie*, 397 U.S. at 114-15.

The Government should not be allowed to expand the time available to bring indictments by its own drafting of indictments. The practical result of the

maneuver can be virtually to obliterate the statute of limitations.

### CONCLUSION

Based on the foregoing, Northern Improvement Company and F-M Asphalt, Inc. request this Court to grant their Petition for a Writ of Certiorari.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1987.

Respectfully submitted.

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APPENDIX A  
IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION  
UNITED STATES OF AMERICA,  
Plaintiff,

vs.

NORTHERN IMPROVEMENT COMPANY;  
STEVE McCORMICK;  
AND F-M ASPHALT, INC.;  
Defendants.

ORDER OF DISMISSAL

The Defendants are charged with a violation of the Sherman Act, 15 U.S.C. § 1, by an indictment which charges:

Offense Charged

17. Beginning at least as early as 1975, and continuing at least through July 28, 1981, the exact dates being unknown to the grand jury, the Defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1).

18. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and coconspirators, a substantial term of which was to submit collusive, non-competitive and rigged bids to the City of Fargo, North Dakota, the City of West Fargo, North Dakota, and the City of Moorhead, Minnesota, for the award of municipal street



improvement projects in those cities.

The "overt acts", as set forth in the indictment are:

- A. Discussing the submission of prospective bids;
- B. Agreeing on a designated successful bidder with the expectation that such successful bidder would ultimately be paid for the work done;
- C. Submitting rigged bids;
- D. Submitting bids containing false statements;
- E. Receiving and accepting payments.

The Bill of Particulars, filed Under Seal by the Government and as limited by this Court recites the following:

The period of time covered by the Indictment in this case begins at least as early as 1975 and continues at least through July 28, 1981. The latter date was the date on which the City of Fargo, North Dakota made final payment for the work performed on Improvement District No. 3682, which was let by the City of Fargo on March 3, 1980 and was won by Northern Improvement Company.

The evidence will show that defendants, individually and through their officers, directors, agents, employees and representatives, participated in a conspiracy to rig the bids on municipal street improvement projects in the cities of Fargo, North Dakota, West Fargo, North Dakota and Moorhead, Minnesota. Generally, the conspirators agreed which company would be the low bidder on those projects, and the designated low bidder then provided bid amount numbers for the other coconspirators to use in preparing their bids so that those bids would be intentionally

high and noncompetitive. The evidence will show, among other things, that there were meetings and conversations involving representatives of Northern Improvement Company, William Collins, Inc., S&S Construction Co, and F-M Asphalt, Inc. throughout the conspiracy period and that in these meetings and conversations the bids for numerous municipal street improvement projects were rigged. The conspirators carried out this conspiracy by submitting the collusive bids to the municipal letting agencies and receiving payments from the municipalities which had been defrauded into believing they had received competitive bids. The conspiracy continued until at least July 28, 1981 when final payment by check was made by the City of Fargo to Northern Improvement Company for work on a project let by the City of Fargo on March 3, 1980. Northern Improvement Company received and deposited this check to its accounts.

Numerous municipal street improvement projects were rigged as part of the conspiracy. Payments for the following municipal street improvement projects, which, among others, were rigged as part of the conspiracy, were made and received on or after October 9, 1980.

1. City of Fargo, North Dakota  
Project No. 3682  
Let on March 3, 1980  
Winning bidder-Northern Improvement Company

Final payment date - July 28, 1981 <sup>1</sup>

<sup>1</sup>Final payment dates are in some instances approximations.

(Footnote in original document.)

2. City of Fargo, North Dakota  
Payment (sic) No. 3688  
Let on March 24, 1980  
Winning bidder - F-M Asphalt, Inc.  
Final payment date - January 27, 1981
3. City of Fargo, North Dakota  
Project No. 3669  
Let on April 7, 1980  
Winning bidder-Northern Improvement  
Company  
Final payment date - December 9, 1980
4. City of Fargo, North Dakota  
Project No. 3687  
Let on April 7, 1980  
Winning bidder - William Collins, Inc.  
Final payment date - January 13, 1981
5. City of Fargo, North Dakota  
Project No. 3693  
Let on April 7, 1980  
Winning bidder-Northern Improvement  
Company  
Final payment date - July 28, 1981
6. City of Fargo, North Dakota  
Project No. 3695  
Let on June 16, 1980  
Winning bidder - S&S Construction Co.  
Final payment date - December 16,  
1980
7. City of West Fargo, North Dakota  
Project No. 2046  
Let on May 21, 1979  
Winning bidder - S&S Construction Co.  
Final payment date - October 9, 1980
8. City of West Fargo, North Dakota  
Project No. 2048  
Let on July 30, 1979

Winning bidder - F-M Asphalt, Inc.  
Final payment date - December 2, 1980

9. City of Moorhead  
Project No. 79-A2-3  
Let on July 10, 1979  
Winning bidder - Northern Improvement  
Company  
Final payment date - November 23, 1981
10. City of Moorhead  
Project No. 79-A3-1  
Let on July 10, 1979  
Winning bidder - F-M Asphalt, Inc.  
Final payment date-December 26, 1980

The Government believes that evidence will further show that the combination and conspiracy was partly express and partly implied.

The indictment was issued on October 9, 1985. The Defendants have made a Motion to Dismiss the Indictment and have agreed, for the purpose of their Motion, that we may assume that all of the information contained in the indictment is true.

The Defendants base their Motion to Dismiss the Indictment on a claim that the government failed to indict during the applicable statute of limitations period. The Defendants argue that they are charged with a conspiracy to violate the Sherman Act by agreeing to submit 'rigged bids.' The consideration for the agreement, as charged by the government, was that each individual conspirator would be given an opportunity to bid on a job without the other co-conspirators bidding competitively on that particular project.

The Defendants' position is that the bids were submitted and contracts awarded pursuant to those bids. The last contract award was made five years

and two months prior to the indictment date. At this point any "conspiracy" was over, and the purposes fully accomplished. Since the statute of limitations provides for a five-year period, the prosecution is barred.

The Government, on the other hand, argues that the purpose of the conspiracy was to profit illegally through the rigged bids. That purpose was not accomplished until payments on the noncompetitive bids were received by the conspirators. The payments for the bid projects were received during the five-year period prior to the indictment, therefore, the prosecution was timely.

The crime charged is a per se violation of the Sherman Act. It does not matter that the actual bids submitted by the 'designated bidder' on a project were higher or lower than the fair market value of the job. If, in fact, the 'designated bidder' submitted a bid which was far below the reasonable value and lost money, that would be no defense to the criminal charge. The specific charge against the Defendants requires no proof of the economics of the matter, only that an agreement was made to bid in a collusive way. The crime would be complete even if none of the 'designated bidders' was successful in obtaining a contract award. It is simple common sense, however, to conclude that the motivation of the conspirators was not altruistic. The Court readily accepts that the conspirators hoped to profit financially through the performance of the project which was assigned to each, and, in order to profit, one must be paid for the project. The Court also concludes that all contractors bidding, legally or otherwise, were similarly motivated.

### ISSUE

The issue presented is fairly narrow. Which event

triggered the statute of limitations -- the bid offer, the contract award, or the payment?

### ANALYSIS

Counsel for each side offer the same cases in support of their respective and opposite positions. The prosecution has recently called the attention of this Court to a shiny new decision of the United States Court of Appeals for the Fourth Circuit as good authority for the government's position. As expected, the Defendants have urged that the case is also good authority for their position.

In *United States v. A-A-A Electrical Co., Inc.*, No. 85-5116 (4th Cir. April 14, 1986), the defendants were charged with violating Section 1 of the Sherman Act by forming a conspiracy to submit rigged bids on a city airport project in restraint of trade. The defendants preserved their right to appeal from an order denying a Motion to Dismiss based upon the statute of limitations, and entered a guilty plea. The Circuit Court affirmed the trial court.

In the language of the Court:

The bids submitted on June 25, 1979, in fact were not competitive and, before that date, appellants and others had conspired to rig the bids on the project. The conspirators, including appellants, discussed their bids before submitting them and designated A-A-A as the conspirator who would submit the lowest rigged bid. (A-A-A was awarded the contract on July 5, 1979.) A-A-A performed the contract and received final payment for its work in 1980. *In May, 1980, A-A-A paid off its co-conspirators for their participation in the bid rigging.*



*Slip Op. at 3 (emphasis added).*

The defendants in A-A-A were indicted on August 28, 1984. One of the issues on appeal, and the one that concerns us here, is whether the five-year statute of limitations ran from the date of the submissions of rigged bids or the date the defendants were paid for the project and paid off their co-conspirators. If the statute began to run on July 5, 1979, (the date the bids were submitted) then the indictment on August 28, 1984 came 5 years and 54 days after the conspiracy ended. If the statute began to run in May of 1980, (the time when the defendants were paid and when they paid off their co-conspirators) then the indictment would have come 4 years and 4 months after the conspiracy ended.

The Court concluded that "a Sherman Act conspiracy continues through the time of illegal payoffs and receipt of payments." Slip Op. at 6. The Court based its decision on the following reasoning:

As long as some action is necessary to achieve a conspiratorial objective, a conspiracy, under the Sherman Act or otherwise, continues until the offense has been abandoned or until the objective is accomplished. (citations omitted.)

In this case, the indictment charged and appellants admitted by their guilty pleas that the conspiracy by its terms included the rigging of a bid, the securing of an artificial price for the (project), and payoffs to the co-conspirators who helped secure the project. Moreover, the requests for payments, which, like the payoffs were also made in 1980, reflected the inflated and noncompetitive price

for the work. These later acts were necessary to the successful consummation of the bid rigging agreement. In fact, as the government points out, the conspirators had to continue cooperating in order for these objectives to be achieved.

Slip Op. at 6-7.

Therefore, the Court concluded that the statute of limitations did not begin to run until May of 1980 and the indictment came within the five-year period.

Both sides have also urged that *United States v. INRYCO, Inc.*, 642 F.2d 290 (9th Cir. 1981) supports their opposite positions. This, too, is a bid rigging case where the consideration for the conspiracy was the award of a subcontract to one of the successful bidder's co-conspirators. The Court held that the purpose of the conspiracy was not accomplished until the subcontracts were awarded, and therefore, the statute did not begin to run until that date.

The government urges that the cited cases are authority for the contention that the purpose of the conspiracy is not realized until payment is received, pointing out that the indictment alleges receipt of payment as an overt act and illegal enrichment as the ultimate object.

The defense urges that the same cited cases are authority for their position that the statute began to run when bids were submitted, as no other 'partnership purpose' remained to be done. The defense also indicates that the cases cited illustrate that payoffs or subcontract awards show the types of agreements which have a continuing partnership purpose.

The basic principle is clear. Although all of the



necessary elements of the crime may have occurred, the statute does not begin to run until the purpose of the illegal conspiracy has been accomplished or abandoned. For so long as there is a continuing partnership purpose, the act of a 'partner' is deemed the act of all, if done in furtherance of the aims of the 'criminal partnership.'

A conspiracy to submit rigged bids is a crime even if no bids are submitted or if the rigged bid is not successful. If the bid is successful, then the conspiracy could continue either (a) as long as some other 'partnership purpose' remains, such as 'payoffs' or 'subcontract awards,' or (b) (as the government alleges) until any of the co-conspirators receives the ultimate purpose - the receipt of payment under the rigged bid.

Each of these possible combinations presents a different timeframe for computation of the statute of limitations.

In its initial denial of the Motions to Dismiss, this Court indicated that the resolution required a complete factual record. Since that time, the Court has had the benefit of oral arguments, a Bill of Particulars, and further briefing generated by the Court's expression of concern that a decision after a three or four week trial with great expense to all concerned was not the most intelligent course of proceeding. An appeal of this order will present the matter to the Circuit Court in advance of that expense. As the Court believes its decision is correct, it is better for all concerned that this order be entered now rather than later.

This case is clearly distinguishable from both A-A-A and INRYCO. No claim is made that the parties engaged in any joint action after submitting the rigged bids. The indictment and the Bill of Par-

ticulars allege an agreement resulting in each defendant being the "designated bidder" on a separate project. The consideration between the 'criminal partners' was the abstention of the others from bidding competitively upon each other's 'designated project.' The terms and conditions of the illegal contract were completed when the rigged bids were submitted. No sharing of the spoils after payment or showing of favoritism on subcontract award is present.

Under the indictment and Bill of Particulars, the Court is forced to the conclusion that the purpose of the conspiracy was accomplished when the rigged bids were submitted. No guarantees existed that any or all of the rigged bids would be a successful bid. Each contractor, if successful as the bidder, had the opportunity to profit or lose money on a specific project. If unsuccessful as a bidder, no consolation payment or subcontract opportunity is present. No co-conspirator had any participation rights or obligation to the others after the bid was submitted.

Each individual conspirator who was awarded a bid received payment upon completion of that project. Common sense tells us that the hope of the opportunity to profit was a common motivating factor behind the formation of the conspiracy. It does not follow, however, that the purposes of the 'criminal partnership' survived the bid submissions. Once the bids were submitted, only the interest of each individual bidder, as an individual and not as a co-conspirator, remained. No partnership interest or conspiracy purpose remained. Therefore, this situation is distinguishable from the situation in *A-A-A* and *INRYCO* where there were 'payoffs' made to co-conspirators after the bids were submitted.

From this analysis, the Court concludes that the indictment was not filed within the five-year statute of limitations period, and the prosecution is barred.

THEREFORE, THE DEFENDANTS' MOTION TO DISMISS IS GRANTED.

Dated this 25th day of April, 1986, at Bismarck, North Dakota.

Patrick A. Conmy, Chief Judge  
United States District Court

APPENDIX B  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

United States of America,

Appellant,

vs.

Northern Improvement Company;  
William Collins, Inc.;  
F-M Asphalt, Inc.; S & S  
Construction Co.; and Steve McCormick;

Appellees.

Civil No. 86-5216

Appeal from the United States District Court,  
District of North Dakota, Southeastern Division,  
the Honorable Patrick A. Conmy, Chief Judge.

REVERSED AND REMANDED.

Opinion of the Court by John R. Gibson, Circuit  
Judge.

Andrea Limmer, Lorenzo E. Bracy, and Mary E.  
Jones, of the Department of Justice for Appellant.

Kermit Edward Bye, of Vogel, Brantner, Kelly,  
Knutson, Weir & Bye, Ltd., for Appellee Northern  
Improvement Company.

Richard J. Braun, of Thompson & Brussart, for  
Appellee Steve McCormick.

David Melincoff, of O'Connor and Hannan, for  
Appellee F-M Asphalt, Inc.

The United States appeals from the dismissal of  
an indictment against Northern Improvement Com-  
pany, F-M Asphalt, and Steve McCormick, charg-  
ing them with violation of section 1 of the Sherman  
Act, 15 U.S.C. § 1 (1982), on the ground that it was  
barred by the statute of limitations. The indictment  
charged participation by the defendant-appellees in

a collusive, non-competitive submission of rigged bids to the cities of Fargo and West Fargo, North Dakota, and Moorhead, Minnesota for the award of municipal improvement projects; the award of various projects to the defendants; and the receipt by the defendants of payment for these projects. The district court held that the last act triggering the running of the five year statute of limitations was the submission of the rigged bids rather than the receipt of payments pursuant to the contracts awarded on the bids. We conclude that the statute did not run until receipt of the payments; we reverse the judgment of the district court dismissing the indictment and remand for trial.

The indictment alleged that the three cities invited municipal street improvement contractors to submit sealed competitive bids on various projects. After the receipt and opening of the bids at a process known as a "bid letting," the cities awarded contracts to the lowest bidder. The indictment charged that as early as 1975 and continuing at least through July 28, 1981 the defendants and others engaged in a continuing agreement to submit collusive, non-competitive, rigged bids to the cities. To effectuate the conspiracy, the indictment charged that the defendants discussed the submission of prospective bids and agreed who among them would be the low bidder with the expectation that it would be awarded the project; that they submitted intentionally high non-competitive bids on some of the projects; and that they received and accepted payments from the cities for work performed on the projects. The bill of particulars detailed the meetings and conversations among the defendants. It alleged that the conspirators agreed which one would be the low bidder on each project and that the designated low bidder provided the

others with numbers to use in preparing their bids so that the other bids would be high and non-competitive. The conspiracy allegedly continued "at least" until July 28, 1981 when the City of Fargo made its final payment to Northern Improvement Company for work on one of the projects that had been let on March 3, 1980.

The indictment was filed on October 9, 1985. The defendants moved to dismiss the indictment on the ground that it was barred by the five-year statute of limitations. 18 U.S.C. § 3282 (1982). When the motion to dismiss was filed, the district court defined the issue as being whether the statute of limitations was triggered by the bid offer, the contract award, or the payment. It concluded that there was no sharing of spoils after the payments on the contracts or showing of favoritism on subcontract awards and that, under the indictment and bill of particulars, the purpose of the conspiracy was accomplished when the rigged bids were submitted. The conspiracy, therefore, terminated at that time. The district court dismissed the indictment.

The government appeals, arguing that the conspiracy continued until all of its objectives were achieved and until the contemplated illicit gain was realized, i.e., Northern Improvement received payment on one of the contracts on June 28, 1981.

A conspiracy is a "partnership in criminal purposes." *United States v. Kissel*, 218 U.S. 601, 608 (1910). "The crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines \*\*\* the duration of the conspiracy \*\*\*." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, "it remains actionable until



its purpose has been achieved or abandoned.”

*United States v. Inryco*, 642 F.2d 290, 293 (9th Cir. 1981) (citing *Kissel*, 218 U.S. at 607-08), *cert. dismissed*, 454 U.S. 1167 (1982). As this court said some years ago: “A criminal conspiracy once formed continues until the object of it has been accomplished unless abandoned short of an overt act, or broken up by the arrest of the participants.”

*McDonald v. United States*, 89 F.2d 128, 133 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937). We have no difficulty in concluding that the conspiracy charged in the indictment continued until Northern Improvement received payment and, accordingly, the five-year statute of limitations had not run against the defendants.

The defendants contend that the only substantive term of the conspiracy was the agreement to submit the rigged bids. This agreement and the submission of the rigged bids are, the defendants argue, the only acts charged against the defendants as being in furtherance of the conspiracy. The indictment and bill of particulars, however, plainly charge the defendants with having entered their bid rigging agreement “with the expectation that (the agreed upon) low bidder would be awarded the project and paid by the city awarding the project for the construction of the project \*\*\*.” Designated Record at 8. They are also charged with “receiving and accepting \*\*\* payments for work performed on \*\*\* municipal street improvement projects.” *Id.* at 9. As indictments are to be read in a common sense, non-technical manner, *United States v. Pleasant*, 469 F.2d 1121, 1125 (8th Cir. 1972), we do not doubt that this indictment is broad enough to encompass the event-receipt of payment--on which the government relies to bring the defendants’ activities within the statute of limitations.

The district court nonetheless concluded that the "purpose" of the conspiracy terminated at the time the bids were submitted, as that was the moment when the "terms and conditions of the illegal contract were completed." *United States v. Northern Improvement Co.*, No. C3-85-062, slip op. at 9 (D.N.D. April 25, 1986). No conspirator owed any right or obligation to any other conspirator beyond that point. After the bids were submitted, "only the interest of each individual bidder, as an individual and not as a co-conspirator, remained." *Id.* at 10. We do not agree.

The purpose of entering the conspiracy, and the purpose of submitting the rigged bids, were not merely to restrain competition for the satisfaction of violating the Sherman Act. We do not deal here with criminal behavior that is an end in itself. Common sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded public improvement contracts at anti-competitively high prices and to be paid for those contracts. As we stated in the different but analogous context of a conspiracy to transport a kidnapped person held for ransom across state lines,

What was the object to be attained by the capture and detention of Brenner? Clearly, it was not for the mere pleasure of his company at the "hide-out" over in Illinois, or in moonlight joy rides back and forward across the Illinois, Wisconsin, and Minnesota boundaries. But as in almost all cases which fall under the ban of the statute, the seizure and detention of Brenner was for the purpose, therefore with the object of illicit gain.

*McDonald*, 89 F.2d at 133.

As in *McDonald*, the object and purpose of this



illegal agreement was "illicit gain," the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.

Our conclusion that the scope and purpose of the conspiracy included the receipt of payments on the contracts awarded pursuant to collusive, non-competitive bids does not answer the defendants' contention that the mere unilateral receipt by a conspirator of payment does not constitute an "overt act" in furtherance of the conspiracy. The district court accepted this proposition. It observed that "(n)o claim is made that the parties engaged in any joint action after submitting the rigged bids. \*\*\* No sharing of the spoils after payment or showing of favoritism on subcontract award (was) present." *Northern Improvement*, slip op. at 9. We believe, however, that Northern Improvement's acceptance and retention of payment was an overt act in furtherance of the conspiracy.

Two recent cases from the Fourth and Ninth Circuits are particularly instructive on this issue. In *United States v. A-A-A Electrical Co.*, 788 F.2d 242 (4th Cir. 1986), the Fourth Circuit considered the commencement of the running of the statute of limitations under circumstances very similar to those herein. The A-A-A defendants were convicted of conspiracy to rig bids for electrical public works contracts in violation of section 1 of the Sherman Act. *Id.* at 243. On appeal, they contended that the indictment should have been dismissed as time-barred, as the conspiracy was complete and its purpose fulfilled on the date the rigged bids were submitted, more than five years prior to the filing of the indictment. *Id.* at 244. The Fourth Circuit observed that the purpose of the conspiracy was to obtain a non-competitive, artificially high price for

the electrical contracts. Thus, the request for and receipt of final payment "reflected the inflated and anticompetitive price for the work \*\*\* (and was) necessary to the successful consummation of the bid-rigging agreement." *Id.* at 245. The court concluded that the statute did not begin to run until *after* the payment was received. <sup>1</sup>

Likewise, in *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), the Ninth Circuit held that a bid-rigging conspiracy did not terminate when the bids were submitted, but rather when the objective of the conspiracy was met. *Id.* at 293. This objective was to restrain competition, to gain a "non-competitive advantage," *id.* at 295, and the award of subcontract work, purchase orders, and monetary payments pursuant to the contracts all furthered that objective. *Id.* "(T)he scope of the conspiracy encompassed more than naked submitted of rigged bids." *Id.* at 294.

The reasoning of the *A-A-A* and *Inryco* courts is persuasive.<sup>2</sup> We conclude that the district court erred in dismissing the indictment against Northern Improvement, F-M Asphalt, and Steve McCormick. The statute of limitations did not begin to run until after Northern Improvement accepted payment from the City of Fargo on July 28, 1981. See *A-A-A*, 788 F.2d at 245-46; *Inryco*, 642 F.2d at 294-95. The district court's dismissal of the indictment is reversed and the case is remanded for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

<sup>1</sup>The district court and the defendants distinguish A-A-A on the basis of payoffs made among the conspirators after receipt of payment on the contracts, characterized by the defendants as concerted and overt acts. *Northern Improvement*, slip op. 6-7, 9. While it is true that the A-A-A court discusses the payoffs, 788 F.2d at 245, we think that the court's reference to payment as being integral to the agreement's purpose--to produce inflated, anti-competitive prices--shows that the payoffs were not necessary to the court's holding. Moreover, the act of accepting funds in payment of a contract by a single conspirator, if in furtherance of the purpose of the conspiracy, may toll the running of the statute of limitations as to the conspiracy whether or not the payment is later divided among the conspirators. *United States v. Girard*, 744 F.2d 1170, 1173-74 (5th Cir. 1984).

<sup>2</sup>The defendants contend that the Fifth Circuit's opinion in *United States v. Davis*, 533 F.2d 921 (5th Cir. 1976), dictates a result contrary to that we reach today. The *Davis* defendants were charged under the general conspiracy statute, 18 U.S.C. § 371, with conspiring to knowingly and wilfully make false statements as to material facts within the jurisdiction of the United States Department of Labor, Manpower Division, in violation of 18 U.S.C. §1001. *Id.* at 923. The Fifth Circuit held that the defendants' convictions were time-barred because the object of the conspiracy was to make the false statements, all of which were made outside the applicable limitations period *Id.* at 927. The government urged, as in this case, that the ultimate object of the conspiracy was to profit from the statements. The court's rejection of this argument was based on a narrow reading of the indictment. *Id.*

In the present case, the indictment charges the defendants with conspiracy to restrain trade in violation of the Sherman Act. This restraint is accomplished both by the submission of non-competitive bids *and* by the request for and receipt of payments at anti-competitive levels. *A-A-A*, 788 F.2d at 245. The *Davis* indictment merely charged conspiracy to make certain false statements. When those statements were made, the conspiracy was over. *Davis*, 533 F.2d at 927. We believe *Davis* is inapposite.

The defendants also contend that their position is supported by a recent dismissal of an indictment by a court relying on the district court's decision in this case. See *United States v. Evans & Assocs. Constr. Co.*, No. C-86-77 (W.D. Okla. Nov. 18, 1986). As we reverse the district court's dismissal of the instant indictment, we believe that the case cited by the defendants is not persuasive.

APPENDIX C  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,  
Appellant,

vs.

NORTHERN IMPROVEMENT COMPANY,  
ET AL,  
Appellees.

Civil No. 86-5215-ND

Appellees' petitions for rehearing en banc have been considered by the court and are denied.

Petitions for rehearing by the panel are also denied.

May 8, 1987

Order Entered at the Direction of the Court:  
Clerk, United States Court of Appeals,  
Eighth Circuit